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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOHN C. HEFLEBOWER,

Plaintiff and Appellant,

v.

RYAN BEARD,

Defendant and Respondent.

F074762

(Super. Ct. No. 14CECG01418)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Kristi Culver Kapetan, Judge.

Fowler / Helsel / Vogt, Jason A. Helsel, Mark A. Vogt and John C. Fowler for Plaintiff and Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, James P. Wagoner and Scott M. Reddie for Defendant and Respondent.

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In this personal injury case, the dispositive legal question before the trial court was whether primary assumption of the risk applied as a defense to the action. Defendant Ryan Beard (defendant) lost his grip while swinging an aluminum baseball bat, the bat flew out of his hands and struck plaintiff John C. Heflebower (plaintiff) in the face. Plaintiff brought suit to recover damages for his injuries and the case proceeded to jury trial. At trial, the testimony was in conflict on whether defendant was engaged in a sport activity (versus mere horseplay) at the time of the accident, and on the nature of plaintiff's relationship to that activity. On a special verdict form containing a series of questions, the jury made findings of fact that (1) defendant was participating in a sports activity at the time plaintiff was injured, (2) plaintiff was not participating in the sports activity at that time, (3) plaintiff knew the sports activity was occurring when he was injured, and (4) defendant's conduct was not so reckless that it was entirely outside the range of ordinary activity involved in the sports activity. Based on these findings of fact, the trial court concluded that primary assumption of the risk was applicable and barred plaintiff's claims. In so holding, the trial court apparently relied on the well-recognized proposition that being hit by an accidentally thrown baseball bat is an inherent risk assumed by baseball game spectators and persons in the field of play. Plaintiff filed the instant appeal from the resulting judgment. We conclude the trial court prejudicially erred because the jury did not make, and was never asked to make, findings of fact on the special verdict form that plaintiff was either involved as a spectator or positioned in the field of play. Lacking such essential findings by the jury, the trial court could not properly conclude that primary assumption of the risk was applicable in the unique circumstances of this case. Accordingly, we reverse the judgment of the trial court and remand the matter to the trial court for a new trial.

FACTS AND PROCEDURAL HISTORY

The incident occurred on July 4, 2013, during a barbeque and pool party at the home of plaintiff's friends, Guy and Debby Desrosiers, in a backyard area which

included a lawn, a swimming pool and a patio. Defendant, who was age 16, was there with his 16-year-old friend Tyler Heflebower (Tyler) and Tyler's 13-year-old brother Joshua Heflebower (Josh).[1] Plaintiff is Tyler's and Josh's father. In addition to swimming in the pool and other activities, the three boys (defendant, Tyler and Josh) played "home run derby" on the lawn. Home run derby was described as a contest in which someone would pitch the wiffle ball to the batter and the batter would try to hit the ball for distance. If the batter hit the ball all the way to the pool or beyond, it was a home run. If not, it was an out. The third player would shag balls. After each batter finished his turn at bat, the players would rotate their positions. At one point, plaintiff took a turn at bat, but he was disappointed by his effort since he only hit a soft ground ball. Plaintiff would also occasionally shag a hit ball and toss it back to the boys if the ball landed in the pool.

Defendant, Tyler and Josh were on their school baseball teams or on a club team, and plaintiff himself had previously played baseball in college and had coached baseball. All were very familiar with the game. Plaintiff admitted that it was a foreseeable risk that a bat could slip out of a batter's hands when swinging at a pitch.

Plaintiff's Theory of the Case

Plaintiff's theory, according to his second amended complaint, was that at the time of the accident defendant was not engaging in home run derby, hitting pitches for distance or any other sport activity, but was carelessly mimicking the forceful swing of Yasiel Puig, a major league baseball player allegedly known for a violent backswing. Allegedly, while mimicking Puig's swing, the bat slipped out of defendant's hands and struck plaintiff, who was unaware of what defendant was doing and was simply attempting to find a towel and dry off after getting out of the pool. In closing argument, plaintiff's attorney characterized defendant's actions as negligent horseplay, messing

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[1] First names are used for convenience only; no disrespect is intended.

around with the bat, screwing off, but *not* a sports activity. Plaintiff's complaint sought to recover damages premised on defendant's careless and negligent conduct.

Defendant's Theory of the Case

Defendant's answer to the second amended complaint asserted the affirmative defense of assumption of the risk. Nearly all of defendant's evidence and argument focused on this defense. Throughout the trial and in closing argument, defendant's position was that at the time the bat slipped out of his hands he was engaged in the sport activity of hitting pitches for distance or home run derby, and that plaintiff was a spectator about 10 to 15 feet away. Defendant admitted he was trying to make a joke at the time of the injury to show that Puig was a better hitter than Buster Posey, but in the course of making the joke he was still engaged in the activity of home run derby and/or of swinging at pitches and attempting to hit home runs. According to defendant, while he was engaged in that sport activity, the bat slipped out of his hands.

Conflicting Evidence At Trial

There was conflicting testimony at trial about what was happening in the moments before plaintiff was hit by the accidentally thrown bat, including whether home run derby, or something similar to it, was actually in progress and, if so, whether plaintiff was aware of that fact and what his relationship was to that sport activity. As background, we briefly summarize the witnesses' divergent versions of what took place.

Defendant testified that, at the time of plaintiff's injury, he, Tyler and Josh were in their positions on the lawn for pitching, hitting and shagging involved in home run derby, but they were no longer keeping score of the home runs. Although not playing the game in the sense of keeping score, in other respects the activity was the same as home run derby. The ball was being pitched by Tyler, Josh was shagging balls and defendant was the batter. There had been an ongoing joke or banter between defendant and the Heflebowers, including with plaintiff, about whether the Dodgers were better than the Giants. The Heflebowers were big Giants fans. According to defendant, when he took a

turn at bat, Tyler pitched the ball and defendant swung and intentionally missed the pitch with a feeble swing while announcing to the others that *that* was a San Francisco Giants' player. As another pitch was thrown to him by Tyler, defendant announced "this is Puig now" toward plaintiff whom defendant could see standing 10 or 15 feet away, just over defendant's left shoulder. Defendant testified he was trying to hit a home run at that moment (using his regular home-run swing) to show that the Dodgers were better than the Giants, but in doing so the bat accidentally flew out of his hands and struck plaintiff. Consistent with defendant's account, the paramedics that arrived at the scene indicated in their records that plaintiff told them he was "playing baseball in the backyard when he was accidentally hit in the face with a baseball bat." Defendant had also testified that although there was a plastic bat available, they realized it was broken and that no one would be able to hit home runs with it, so they only used the metal bat.

In contrast, Tyler testified at trial that they had stopped playing home run derby when it was time for dinner and did not resume the game afterwards. The incident occurred after dinner. According to Tyler, he and defendant got into a debate about who was a better hitter between Yasiel Puig and Buster Posey. Tyler's dad (plaintiff) was not part of that conversation. After dinner, defendant walked over and picked up the metal bat and started to demonstrate how Puig and Posey swing. Tyler testified that no one was pitching to defendant at that time; defendant was just taking exaggerated swings to imitate the players. When defendant took an especially hard cut to show how Puig swings, the bat went flying in the air and hit Tyler's dad. Testimony from Tyler's prior deposition was introduced as impeachment, which indicated that at the time of injury the boys were playing home run derby, but that in the midst of the game defendant took some dry cuts (i.e., no ball was pitched) to demonstrate the swing of Posey and Puig. Tyler indicated they began earlier in the day using a plastic bat, but they switched to the metal bat. At trial, Tyler insisted his dad had used the plastic bat when he took a turn at bat, but

Tyler's prior deposition testimony had stated that he could not recall whether his dad used a metal or plastic bat.

In Josh's testimony at trial, he gave an account that was substantially the same as Tyler's. According to Josh, there was no game of home run derby going on after dinner when the accident occurred. Rather, defendant just went over and picked up the bat and started to imitate Puig and Posey. When defendant was demonstrating Puig's swing, he swung the bat too hard and it slipped out of his hands. Josh said there was no ball being pitched to defendant at the time; defendant was just messing around or goofing off. Josh agreed with counsel's characterization that defendant was simply engaging in horseplay. Josh testified his dad was about 30 feet away from defendant when the bat hit him. During cross-examination, Josh's prior deposition testimony was introduced for impeachment purposes, wherein Josh had admitted that his mom or dad cautioned him "don't ever say anything that might indicate dad was participating in the game."

Plaintiff testified that, after dinner, he cleaned up the barbecue and got in the pool to cool off. Then, he got out of the pool and started looking around the patio area for a towel. While on the patio, he also glanced around the corner to see if there were any towels along the back wall of the garage. He could not find a towel, so he put on his shirt. When he looked up from putting on his shirt, he got hit in the face by the baseball bat. Plaintiff testified that in the period of time after he got out of the pool and was looking for a towel—i.e., the moments before getting hit by the bat—he was not paying attention to any other people in the backyard, and he did not observe or know what they were doing.

Plaintiff further testified that sometime before dinner, the boys were playing home run derby with a wiffle ball and a plastic bat. He stated that he took a turn at bat, but there was only a plastic bat, not a metal bat. When asked on cross-examination whether he had been aware all along of the metal bat because it was the same bat he used when he took a turn at bat before dinner, plaintiff denied it. Plaintiff's trial testimony was

impeached by his prior deposition testimony in which he had given a very definite and detailed account of the metal bat as "the only one" he saw and used, describing it as a small metal T-ball bat, and stating that he was not aware of there ever being a plastic bat. Plaintiff also admitted on cross-examination that when the boys were hitting the wiffle ball he could hear a "ping of that bat" which he believed resulted from use of a metal bat.[2]

Plaintiff's Motion to Amend

During the fourth day of trial, plaintiff's counsel made an oral motion to amend the complaint to conform to proof regarding the nature of defendant's conduct. Specifically, plaintiff wanted to allege that defendant swung the bat so forcefully and in such a manner as to be "so far outside" what was normal to the game that it could be considered "reckless" and not merely negligent. The trial court denied the motion, but reserved the possibility of permitting the jury to address the issue of recklessness "assuming that the jury answers certain preliminary fact questions in a certain way." Ultimately, the trial court did allow the jury to make a preliminary fact finding about whether defendant acted recklessly.

Special Verdict Form for Findings of Fact

After the evidentiary portion of the case was concluded, the trial court and the parties' counsel discussed having the jury resolve certain preliminary factual issues to assist the trial court in determining the legal question of the applicability of assumption of the risk. It was agreed that a special verdict form should be prepared for that purpose. After lengthy discussion with the parties' counsel on what matters should be included on the special verdict form, the trial court proposed the version of the special verdict form that was ultimately used.

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[2] Plaintiff's only explanation for changing his testimony was that, after his deposition, his boys reminded him about the plastic bat.

Jury Instructed on Primary Assumption of Risk re: Coparticipants

Since plaintiff's legal theories alleged in the second amended complaint were premised on ordinary negligence, the jury was instructed on the negligence standard of "reasonable care to prevent harm" to others. The trial court also instructed the jury using a standard jury instruction for primary assumption of the risk involving *coparticipants* in a sport activity, based on former CACI No. 408 (CACI No. 408).[3] The instruction communicated that if plaintiff was participating in a sports activity at the time of his injury, then to establish defendant's liability as a coparticipant in the sports activity, plaintiff must prove that defendant "acted so recklessly that his conduct was entirely outside the range of ordinary activity involved in the sports activity." The trial court modified the instruction in minor respects, including by adding a parenthetical statement that "if you find [plaintiff] was not participating in a sports activity at the time he was injured, you will not use this instruction."

The Jury's Specific Factual Findings

On August 19, 2016, the jury returned its special verdict, making the following findings of fact in response to the questions presented on the special verdict form:

1. "Was [defendant] RYAN BEARD participating in a sports activity at the time [plaintiff] JOHN C. HEFLEBOWER was injured?" Answer: "Yes." (By answering "yes," the jury was instructed to answer question 2.)

2. "Was [plaintiff] JOHN C. HEFLEBOWER participating in a sports activity at the time he was injured?" Answer: "No." (By answering "no," the jury was instructed to answer question 3.)

3. "Did [plaintiff] JOHN C. HEFLBOWER know the sports activity was occurring at the time he was injured?" Answer: "Yes." (By answering "yes," the jury was instructed to answer question 4.)

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[3] This standardized civil jury instruction has subsequently been renumbered as CACI No. 470 (July 2018 ed.).

4. "Was [defendant] RYAN BEARD's conduct so reckless that his conduct was entirely outside the range of ordinary activity involved in the sports activity?" Answer: "No." (By answering "no," the jury was instructed to answer no further questions and to sign the form.)[4]

Judgment Entered Based on Special Verdict

On August 26, 2016, based on the findings of fact made by the jury on the special verdict form, the trial court entered judgment in favor of defendant. After reciting the jury's answers to questions No. 1 through 4 of the special verdict form, the trial court ruled as follows: "It appearing by reason of said verdict that: Plaintiff John C. Heflebower is not entitled to judgment against Defendant Ryan Beard because the doctrine of assumption of the risk bars the Plaintiff's claims because the injuries he sustained arose from a risk inherent in the sporting activity in which Beard was engaged."

Motion for New Trial Denied

Plaintiff filed a motion for new trial, arguing among other things that the special verdict form was erroneous and inconsistent with the assumption of risk jury instruction. On November 4, 2016, the trial court denied the motion for new trial. The trial court explained: "The Court properly tasked the jury with making preliminary fact findings as to the doctrine of assumption of the risk. The jury did so. There was nothing inconsistent in their findings. The Court then properly decided the legal issue of duty based upon the preliminary facts as found by the jury. Because the Court found no duty [pursuant to primary assumption of the risk], there was no negligence."

On November 23, 2016, plaintiff filed his notice of appeal from the judgment.

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[4] The remaining questions, which the jury was told it did not need to answer (based on the responses to the first four questions), were questions No. 5 through 10 on the special verdict form, which addressed negligence, causation, damages, and contributory fault.

DISCUSSION

I. Standard of Review

The application of the affirmative defense of primary assumption of the risk requires a legal conclusion that "by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 314–315 (*Knight*).) Because the existence and scope of a defendant's duty of care is an issue of law determined by the court, we review that issue de novo. (*Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 796.) Additionally, we apply a de novo standard of review to questions of whether the jury was erroneously instructed (*Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 617), as well as to questions of whether the jury made inconsistent findings on a special verdict form or whether the special verdict form was legally deficient. (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 707; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325.)

II. Overview of Primary Assumption of Risk

Plaintiff's appeal challenges the propriety of the trial court's determination that primary assumption of the risk was applicable in this case, arguing among other things that the jury was improperly instructed and/or misled by an inapplicable jury instruction on primary assumption of the risk and/or by an alleged inconsistency (or conflict) between the jury instruction and the special verdict form. We begin with an overview of the law concerning primary assumption of the risk.

Primary assumption of the risk is typically asserted as a defense to personal injury claims arising from an active sport or recreational activity that is engaged in "for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury." (*Peart v. Ferro* (2004) 119 Cal.App.4th 60, 71.) "Although persons generally owe a duty of due care not to cause an unreasonable risk of harm to others (Civ. Code, § 1714, subd. (a)), some activities—and

specifically, many sports—are inherently dangerous. Imposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation." (*Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990, 1003 (*Kahn*).) "The primary assumption of risk doctrine, a rule of limited duty, [was] developed to avoid such a chilling effect." (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154.)

Where conditions or conduct that otherwise might be viewed as dangerous are an integral part of the sport itself, courts should not "hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport" because "in the heat of an active sporting event …, a participant's normal energetic conduct often includes accidentally careless behavior…. [V]igorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct." (*Knight*, *supra*, 3 Cal.4th at p. 318.) Thus, in cases where the defense is applicable, a plaintiff's claim arising out of risks inherent in the sport activity is "barred entirely because of a *legal* determination that the defendant did not owe a duty to protect the plaintiff from the particular risk of harm involved in the claim." (*Kahn, supra*, 31 Cal.4th 990, 1003, citing *Knight*, *supra*, 3 Cal.4th at pp. 310, 314–315.)

As articulated by the Supreme Court, when an injury arises out of a sports or recreational activity, " 'the question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport.' [Citations.]" (*Kahn, supra*, 31 Cal.4th at p. 1004; *Knight, supra*, 3 Cal.4th at p. 309.) We briefly elaborate on each of these factors relevant to the duty issue.

In making the legal determination of whether primary assumption of the risk applies—i.e., in deciding the question whether the defendant owes a duty of care to

protect the plaintiff from the particular risk of harm in the claim—the court looks first at the *nature* of the sporting activity at issue. "[I]t would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events." (*Kahn*, *supra*, 31 Cal.4th at p. 1004.) "Thus, the doctrine has been applied specifically to sports and sport-related activities involving physical skill and challenges posing significant risk of injury to participants in such activities, and as to which the absence of such a defense would chill vigorous participation in the sporting activity and have a deleterious effect on the nature of the sport as a whole." (*Peart v. Ferro*, *supra*, 119 Cal.App.4th at pp. 71–72.)

With respect to the sport of baseball, it has long been held that the inherent nature of the sport includes a risk to players and spectators alike of being hit by a thrown bat or a batted or thrown ball. (See, e.g., *Kahn*, *supra*, 31 Cal.4th at p. 1004 [under primary assumption of risk principles, a batter who accidentally throws a bat during a game owes no duty of care to protect spectators in the stands from being struck]; *Knight*, *supra*, 3 Cal.4th at p. 318 [noting established rule that a baseball player is not liable to other players for a carelessly thrown ball or bat during a game, absent a showing of reckless conduct that is totally outside the range of ordinary activity involved in the sport]; *Nemarnik v. Los Angeles Kings Hockey Club* (2002) 103 Cal.App.4th 631, 637 ["California courts have long held that the risk to spectators of being hit by an accidentally thrown bat or a foul ball is an inherent risk of baseball that is assumed by the spectator"]; *Ratcliff v. San Diego Baseball Club* (1938) 27 Cal.App.2d 733, 737 (*Ratcliff*) [inherent risk to spectator of a thrown bat]; see also, *Quinn v. Recreation Park Assn.* (1935) 3 Cal.2d 725, 729 ["[O]ne of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls"].) Here, defendant asserted and the jury apparently agreed, that a variation on the sport of baseball and/or of baseball hitting practice was taking place at the time of plaintiff's injury.

In addition to consideration of the nature of the sport activity, the court must also consider "the *relationship* of the defendant and the plaintiff to that activity or sport." (*Kahn, supra*, 31 Cal.4th at p. 1004, italics added.) For example, it is recognized that duties with respect to the same risk may vary according to the *role* played by particular defendants involved in the sport: "In the sport of baseball, for example, although the batter would not have a duty to avoid carelessly throwing the bat after getting a hit—vigorous deployment of a bat in the course of a game being an integral part of the sport—a stadium owner, because of his or her different relationship to the sport, may have a duty to take reasonable measures to protect spectators from carelessly thrown bats. For the stadium owner, reasonable steps may minimize the risk without altering the nature of the sport." (*Ibid*.) In most cases, the defendant's relationship to the sport activity is that of a participant or player, but other possible roles may include owners of sports facilities, and coaches or instructors. (*Id*. at p. 1005.) In the present case, the jury found defendant to be a participant in the sport activity.

The *plaintiff's* role or relationship to the sport activity must also be considered. Although in the typical case, the injured plaintiff was a coparticipant in the sport activity in which the defendant was engaged, in some instances the plaintiff was merely a spectator or in the field of play. In *Knight*, the Supreme Court cited with approval the case of *Ratcliff, supra,* 27 Cal.App.2d 733, a case involving a spectator in the stands who was struck by an accidentally thrown bat. (*Knight, supra,* 3 Cal.4th at p. 317.) The spectator had sued both the baseball player and the stadium owner for her injuries, and the Court of Appeal in *Ratcliff* affirmed the jury's decision to hold the stadium owner liable but *not* the player. In approving of *Ratcliff's* approach, *Knight* discerned that the *Ratcliff* court had implicitly recognized that two distinct questions of duty were involved, one concerning the baseball player and another concerning the stadium owner. (*Knight, supra,* 3 Cal.4th at p. 317.) We subsequently noted in *Mastro v. Petrick* (2001) 93 Cal.App.4th 83 (*Mastro*) that *Knight's* analysis of the *Ratcliff* case clearly indicated that

the doctrine of primary assumption of the risk may potentially apply where the injured party was not a coparticipant but merely a spectator: "Clearly the spectator was not a coparticipant in the baseball game. Nevertheless, the *Knight* court accepted the assumption that the relationship of the plaintiff (being a spectator) to the activity was not a relationship that should create a duty of care on the part of the ballplayer. Rather, the ballplayer was performing his sport in a place properly designated for it, and should not be restrained from vigorously engaging in his sport." (*Mastro, supra*, 93 Cal.App.4th at p. 91 [holding, by the same logic, that a snowboarder "should not be restrained or inhibited from vigorously engaging in his sport … [merely] because of the presence of skiers on the same slope"].) Finally, as noted above, in *Kahn* the Supreme Court returned its attention to the thrown baseball bat example it had mentioned in *Knight*, stating as follows: "In the sport of baseball, for example, although the batter would not have a duty to avoid carelessly throwing the bat after getting a hit—vigorous deployment of a bat in the course of a game being an integral part of the sport—a stadium owner, because of his or her different relationship to the sport, may have a duty to take reasonable measures to protect *spectators* from carelessly thrown bats." (*Kahn, supra*, 31 Cal.4th at p. 1004, italics added.)

In *Mann v. Nutrilite, Inc*. (1955) 136 Cal.App.2d 729, another nonparticipant or spectator case, the plaintiff was a chaperone for a girls' softball team and was standing *in the field of play* during pregame warm-up when she was hit in the head by a thrown ball. (*Id*. at p. 729.) In concluding that assumption of the risk was applicable to the plaintiff/ chaperone's claims, the Court of Appeal stated: "The general rule is well established that the risk of being struck by batted or thrown balls is one of the natural risks assumed by spectators attending a ball game, in the absence of a sufficient showing that ordinary care was not exercised by the management. The rules established in that connection should be much more applicable where the injured person goes *on the field of play* and is, in effect, in the position of a participant." (*Id*. at p. 734, italics added.)

As we summarized in *Mastro* regarding the parties' *relationship to the sport* as an aspect of the duty analysis: "[W]hen the injury occurs in a sports setting the court must decide whether the nature of the sport and the relationship of the defendant and the plaintiff to the sport—as coparticipant, coach, premises owner or *spectator*—support the legal conclusion of duty. [Citation.] And where a court concludes no duty exists, our Supreme Court has labeled this lack of duty as the doctrine of 'primary assumption of risk.' [Citation.]" (*Mastro, supra,* 93 Cal.App.4th at p. 88, italics added.) As discussed above, we explicitly pointed out in *Mastro* that primary assumption of the risk is not limited solely to coparticipants, since the Supreme Court in *Knight* had endorsed its application where the injured party was a spectator. (*Mastro,* at pp. 89–90.) *Mastro* was not a spectator case, but involved an injury to a snow skier by a snowboarder using the same slope or venue. Since the two activities were distinct, with differing degrees of risk, the parties were not coparticipants in the same sport activity. Nonetheless, we concluded that primary assumption of the risk was applicable, holding that "one who is pursuing his sport in an appropriate venue owes no duty of care to those who choose to occupy the same venue to engage in their (possibly different) activity simultaneously." (*Id*. at p. 90.)

When primary assumption of the risk applies, the defendant does not have a duty to protect the plaintiff from the risks inherent in the sport activity, but the defendant generally *does* have a duty not to *increase* the risk of harm beyond what is inherent in that sport activity. (*Nalwa v. Cedar Fair, L.P., supra,* 55 Cal.4th at p. 1154; *Kahn, supra,* 31 Cal.4th at p. 1004; *Peart v. Ferro, supra,* 119 Cal.App.4th at p. 73, fn. 4.) In cases involving coparticipants in a sport, our Supreme Court has explained that because imposing liability for "normal energetic conduct" while playing—including for careless conduct—would deter vigorous engagement in the sport and alter its fundamental nature, coparticipants breach a duty of care to each other only if they "intentionally injure[ ] another player or engage[ ] in conduct that is so reckless as to be totally outside the range

of the ordinary activity involved in the sport." (*Kahn, supra,* 31 Cal.4th at p. 1005; *Knight, supra,* 3 Cal.4th at pp. 320–321.)

III. No Prejudicial Error From CACI No. 408 or Conflict with Special Verdict Form

Presumably because there was a factual issue regarding plaintiff's degree of involvement or participation—if any—in the asserted sports activity at the time of his injury, the trial court elected to instruct the jury using CACI No. 408, which instruction sets forth the standard of care to be applied where a plaintiff is a *coparticipant* in a sports activity. As modified by the trial court, the CACI No. 408 instruction was as follows:

> "If you find that [plaintiff] was participating in a sports activity at the time he was injured, [plaintiff] contends that [defendant] is responsible for that injury. (If you find [plaintiff] was not participating in a sports activity at the time he was injured, you will not use this instruction). To establish this claim, [plaintiff] must prove all of the following:
>
> "1. That [defendant] acted so recklessly that his conduct was entirely outside the range of ordinary activity involved in the sports activity;
>
> "2. That [plaintiff] was harmed; and
>
> "3. That [defendant's] conduct was a substantial factor in causing [plaintiff's] harm.
>
> "Conduct is entirely outside the range of ordinary activity involved in the sports activity if that conduct can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the sports activity.
>
> "[Defendant] is not responsible for an injury resulting from conduct that was merely accidental, careless or negligent."

Even though CACI No. 408 is plainly a correct statement of the primary assumption of the risk doctrine as set forth in *Knight*, *supra*, 3 Cal.4th at p. 320, plaintiff argues that the trial court erred and misled the jury in giving that instruction because, in the end, the jury determined that plaintiff was *not* a participant in the sports activity and

the instruction articulated the standard applicable to coparticipants. We disagree that prejudicial error has been shown. The instruction, as modified by the trial court, directed that "if you find [plaintiff] was not participating in a sports activity at the time he was injured, you will not use this instruction." There is no reason to believe the jury did not follow the trial court's clear directive to not use the instruction if plaintiff was not a participant. In other words, it appears that the jury, in reading this instruction, would simply have proceeded to the task before it of answering the questions set forth in the special verdict form. Thus, even assuming *arguendo* it was error to use the instruction when it was uncertain whether plaintiff would be deemed a coparticipant in the sports activity, no prejudice has been shown. "In order to persuade an appellate court to overturn a jury verdict because of instructional error, an appellant must demonstrate that 'the error was prejudicial [citation] and resulted in a "miscarriage of justice." ' [Citations.] Instructional error ordinarily is considered prejudicial only when it appears probable that the improper instruction misled the jury and affected the verdict." (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1213.) No such prejudicial error has been demonstrated.

Plaintiff also argues the trial court's use of CACI No. 408 conflicted with the special verdict form. The purported conflict was as follows: While CACI No. 408 set forth the reckless conduct threshold of liability where the plaintiff was a coparticipant in a sports activity, the special verdict form (in question 4) asked the jury to proceed to decide whether defendant's conduct was reckless (i.e., outside the bounds of the risks inherent in the sport) *even though*, in response to question 2 on the verdict form, the jury had specifically found that plaintiff was *not* a coparticipant. We disagree with plaintiff's contention that there is a necessary conflict between CACI No. 408 and the special verdict form. The two are in conflict only if one mistakenly assumes that the only possible basis for applying the doctrine of primary assumption of the risk is where the injured party is a coparticipant in the sport. But, as we explained in our overview of the

law (above), at least in the context of sports such as baseball—with its inherent risk of getting hit by a foul ball or a thrown bat—the doctrine has been applied to persons who are merely spectators in the stands and/or passive observers in the field of play. (See, e.g., *Mastro, supra,* 93 Cal.App.4th at p. 91 [noting defense available in spectator cases]; *Mann v. Nutrilite, Inc*., *supra*, 136 Cal.App.2d at p. 734 [chaperone in field of play was in a position comparable to a participant].)

In any event, the jury could not have been misled because it was not the jury's role to decide whether primary assumption of the risk was applicable under a given set of facts such that the reckless conduct standard of care would apply; that was solely the task of the court. As the Supreme Court stated in *Knight*: "[T]he question of the existence and scope of a defendant's duty of care is a *legal* question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." (*Knight*, *supra*, 3 Cal.4th at p. 313.) Here, the preliminary findings of fact on the special verdict form were to assist the trial court in making its determination of the issue of law regarding the applicability of primary assumption of the risk. The jury was given a specific list of questions on which findings of fact were requested, and the jury did exactly what it was asked to do. However, *the legal issue* of whether the particular findings of fact were sufficient to support the conclusion that primary assumption of the risk applied (including the reckless conduct standard)—*even though* plaintiff was not a coparticipant in the sports activity—was not something the jury could be misled about, because it was not the jury's decision. Rather, because the trial court alone was tasked with determining whether the findings of fact supported application of the doctrine of primary assumption of the risk, the instruction of the jury using CACI No. 408 and/or the purported conflict with the special verdict form could not have had any impact on the outcome of the case. Consequently, no prejudicial error stemming from the jury instruction or the purported conflict with the special verdict form has been shown.

IV. The Special Verdict Form Failed to Include Factual Issues Necessary to Allow the Trial Court to Conclude that Primary Assumption of Risk Applied

Plaintiff argues that "[u]pon finding Plaintiff was a nonparticipant in any sports activity, the primary assumption of risk defense became inapplicable" and, as a result, rather than being directed by the special verdict form to answer question 4 (the reckless conduct standard for purposes of primary assumption of the risk) the jury should have been directed to answer question 5 which addresses whether defendant was negligent. In essence, plaintiff challenges the special verdict form as contrary to established law. Defendant responds that plaintiff's legal premise (i.e., that the defense is only available to coparticipants) is faulty because case law has applied the defense in the baseball context to persons who were not participants in the sport but merely spectators at the game or in the field of play. In a forceful reply to defendant's argument, plaintiff points out that there was no finding of fact made by the jury on the special verdict form that plaintiff was either a spectator or in the field of play, and therefore the trial court could not have permissibly concluded, on the basis of the jury's preliminary findings of fact, that primary assumption of the risk applied on those hypothetical grounds. As plaintiff's counsel argues: "The Special Verdict form did not ask the jury whether Plaintiff was in a 'field of play' or whether Plaintiff was a 'spectator,' and the jury made no such determination. [Therefore,] [t]his Court cannot possibly deny Plaintiff's right to a fair trial by speculating as to what the jury did or did not believe." As explained more fully below, we believe that plaintiff is correct.

In broad terms, the issue before us may be characterized as whether the trial court correctly concluded, based on the particular findings of fact set forth in the special verdict form, that primary assumption of the risk was applicable in this case. However, in view of plaintiff's argument that the special verdict form improperly directed the jury to apply the standard applicable to primary assumption of the risk, we believe the issue is more precisely framed as whether the special verdict form was fatally defective in failing to

include essential controverted issues that had to be found by the jury in order for the trial court to resolve the question of whether primary assumption of the risk was applicable. The fundamental problem, as alluded to above, is that the jury was never asked to make findings on whether plaintiff was either a spectator or in the field of play.

We analyze the sufficiency of a special verdict form de novo. (*Saxena v. Goffney*, *supra*, 159 Cal.App.4th at p. 325.) In reviewing a special verdict, we do not imply findings on all issues in favor of the prevailing party, as we would with a general verdict. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285.) That is so because of the nature of a special verdict. " ' "A special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, … and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." [Citation.]' " (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 136 (*Trejo*); see Code Civ. Proc., § 624.) " 'The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict …." ' " (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960.)

" ' "A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted issue." ' " (*Trejo*, *supra*, 13 Cal.App.5th at p. 136; *Saxena v. Goffney*, *supra*, 159 Cal.App.4th at p. 325.) If a special verdict form is used but no findings are made on one or more essential factual issues, the legal question before the court cannot properly be decided because it is "like a puzzle with pieces missing; the picture is not complete." (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 855, fn. omitted.) For all these reasons, where a special verdict form leaves out an issue of ultimate fact necessary to resolve the question of law before the court, the special verdict will be found fatally defective and the matter may be reversed and remanded for a new trial. (*Fuller-*

Austin Insulation Co. v. Highlands Ins. Co. (2006) 135 Cal.App.4th 958, 1006–1007 [special verdict form "fatally defective" warranting reversal and retrial because it did not permit the jury to resolve the controverted issue of plan's "reasonableness"]; see *Trejo, supra*, 13 Cal.App.5th at pp. 137–141 [special verdict form fatally defective for not including question permitting the jury to make a finding on issue of failure to warn, holding that on remand any special verdict form must include that question]; *Vanderpol v. Starr* (2011) 194 Cal.App.4th 385, 396–397 [special verdict form which failed to ask jury to decide issue of injury to plaintiff's use or enjoyment of property was defective on its face; new trial ordered]; *Falls v. Superior Court*, *supra*, 194 Cal.App.3d at pp. 854–855 [mistrial properly granted where jury failed to answer all the essential factual questions on special verdict form necessary to determine liability].)

In the present case, the jury followed the special verdict form and made the following findings of fact in response to the first three questions: (i) defendant was participating in a sport activity at the time of the accident, (ii) plaintiff was not participating in the sport activity at that time, and (iii) plaintiff knew the sports activity was occurring at the time he was injured. Based on these three findings of fact by the jury, the trial court concluded that primary assumption of the risk was applicable. The fourth and final finding of fact on the special verdict form—i.e., that defendant's conduct was not so reckless as to be outside the range of ordinary activity involved in the sport activity—logically presupposes the trial court's conclusion to apply primary assumption of the risk. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112 [once court resolves legal issue of duty, the question of whether a defendant's conduct increased risks inherent in the sport is a factual question for the jury]; accord, *Fazio v. Fairbanks Ranch Country Club* (2015) 233 Cal.App.4th 1053, 1061–1063.)

We agree with plaintiff's position that the findings of fact on the special verdict form did not support the trial court's legal conclusion that primary assumption of the risk was applicable. One of the essential considerations in the trial court's duty analysis is

plaintiff's relationship to the sport activity. (*Kahn, supra,* 31 Cal.4th at p. 1004; *Knight, supra,* 3 Cal.4th at p. 309.) Ordinarily, in cases where the defense is found to apply, the relationship is that of a willing coparticipant in the sport activity. (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 ["Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks"].) Here, since the jury found plaintiff was *not* a coparticipant in the sport activity, it became essential for the trial court to know whether plaintiff was, factually speaking, either involved as a spectator or situated in the field of play, since these would be the only alternative grounds for concluding that primary assumption of the risk was applicable. (See, e.g., *Mastro, supra,* 93 Cal.App.4th at p. 91 [defense available in spectator cases]; *Mann v. Nutrilite, Inc., supra,* 136 Cal.App.2d at p. 734 [chaperone in field of play was is a position comparable to a participant, therefore defense available].) However, as plaintiff correctly points out, the jury never made such findings and was not asked to do so on the special verdict form—even though there were several divergent accounts at trial of where plaintiff was located in the backyard, his distance from the batter and what he was doing at the time of the injury. In light of this conflicting testimony, the crucial questions of whether plaintiff was a spectator of the sport activity and/or was situated in the field of play at the time of his injury were factual issues that had to be resolved by the jury. Unfortunately, the special verdict form did not ask the jury to address or make findings on those matters, and there is no way of forecasting what the jury would have found.

Therefore, lacking essential factual findings by the jury upon which to ascertain the nature of plaintiff's relationship to the sports activity—specifically, whether plaintiff was a spectator or in the field of play at the time of his injury—the trial court was not in a position to reach the conclusion that primary assumption of the risk was applicable. Consequently, we hold the trial court erred in concluding the defense applied. The mere fact that plaintiff subjectively knew the sports activity was happening was clearly

insufficient, by itself, to permit the conclusion that plaintiff was involved as a spectator or positioned in the field of play. Moreover, we are not prepared to hold, at least not on this record, that simply because defendant and others were engaged in something like home run derby or hitting practice with a wiffle ball during a backyard barbeque and swim party it would, as a matter of law, convert all parts of the yard into the equivalent of Wrigley Field or a little league stadium and automatically make everyone in the yard a "spectator" or "in the field of play" for purposes of primary assumption of the risk regardless of where they were situated or what they were doing. Rather, as we have explained, a more complete factual basis for ascertaining plaintiff's relationship to the sport activity was required and should have been addressed on the special verdict form. Because the special verdict form failed to permit the jury to make factual findings on whether plaintiff was a spectator or in the field of play, which were necessary to permit the conclusion that primary assumption of the risk applied in this case, the special verdict was fatally defective and the trial court's judgment based thereon was in error.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for a new trial. Costs on appeal are awarded to plaintiff.

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LEVY, Acting P.J.

WE CONCUR:

_____
SMITH, J.

_____
DE SANTOS, J.